APPENDIX

Opinion Below

BARNEY ELLIS FRENCH, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

No. 27637

COURT OF CRIMINAL APPEALS OF TEXAS

June 1, 1955

Rehearing Denied Oct. 5, 1955

MORRISON, Presiding Judge

The offense is possession of marihuana; the punishment, seven years.

(1) Officer Tucker, of the Narcotic Division of the Houston Police Department, testified that he and his fellow officer Free were dressed in civilian clothes and seated in an automobile near the Trade Winds Cafe watching while certain uniformed officers were in the process of making some arrests inside the cafe on the night in question; that he observed the appellant, whom he knew and about whom he had received reports that he was handling marihuana, walking from his automobile which was parked on a parking lot at the rear of the cafe. Tucker stated that the appellant proceeded to the door of the cafe, where he could see inside, but instead of entering he abruptly turned and ran back to his automobile, started the motor, and spun his wheels in an effort to beat a hasty retreat, but that he and Free moved their automobile so as to block the appellant's exit. Tucker testified that he approached the appellant's automobile, exhibited his police credentials, instructed the

appellant to get out, searched his person, and found three cigarettes wrapped in brown paper, and that following this Officer Free searched the appellant's automobile and found two packages.

It was shown by Chemist McDonald that the cigarettes and the packages contained marihuana.

The appellant did not testify or offer any evidence in his own behalf.

There are two questions presented on appeal. We shall first discuss the admissibility of the fruits of the search.

The city ordinance of the City of Houston, adopted pursuant to provisions of Article 214, Vernon's Ann. C. C. P., was introduced in evidence. This appears to be the same ordinance which this Court upheld in Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, authorizing the arrest, detention and search of persons of suspicious demeanor.

In McCutcheon v. State, Tex. Cr. App., 252 S.W. 2d 175, writ of certiorari denied, 345 U.S. 929, 73 S.Ct. 789, 97 L. Ed. 1359, we held the search of an automobile was authorized in a city having such an ordinance where the officers saw two men step up on the sidewalk and throw something over a hedge and, after the men denied having thrown anything, the officers found two shirts beyond the hedge and carried the men to their automobile and searched the same.

We think that the McCutcheon case is authority for our holding here that the fruits of the search were admissible.

We do not hold that the information which the officer had received about the appellant's connection with nar-

cotics alone would have authorized the search, but we do hold that his flight under the circumstances here presented, together with the information which the officer had about him, authorized the arrest of the appellant as a person of suspicious demeanor under the ordinance, and the subsequent search.

(2) The next bill of exception relates to argument of the prosecutor which the appellant contends constituted an indirect reference to the appellant's failure to testify. The very careful trial court qualified the bill by referring to the statement of facts and attached to the bill a transcript of the entire argument for the prosecution and the defense.

The bill complains of the following argument:

> "I don't want you to guess a man into the penitentiary, but when the State brings you witnesses that's not rebutted, witnesses that are not impeached, to show you that this man is guilty of the charge of the possession of marijuana, I say that you ought to put him in the penitentiary where he belongs. * * * "

From the statement of facts, we learn that, while the officers were at the scene of the arrest and while the search was in progress, or immediately thereafter, an unidentified fourth man approached the group and, not recognizing Tucker and Free as officers, addressed the appellant as follows: "Barney, are you clean—if you are not you had better dust out, the harness bulls are inside."

It thus appears that there was another person present who knew the appellant by his first name who might have been called as a witness but was not. For argument to violate Article 710, V.A.C.C.P., it must be such as cannot

reasonably be applied to the failure of the accused to produce testimony other than his own. Alford v. State of Tex. Cr. App., 255 S.W. 2d 519, and Hubbard v. State, 94 Tex. Cr. R. 480, 251 S.W. 1054.

From the statement of facts and the argument, it appears that Officer Free was not called as a witness. State's counsel stated that this was done to save time. Appellant's counsel devoted most of his argument to the failure to call Free as a witness. The appellant could have called him, and this is another reason why the argument quoted above does not reflect reversible error.

Finding no reversible error, the judgment of the trial court is affirmed.

DAVIDSON, Judge (dissenting).

The arrest of appellant was violative of his legal and constitutional rights. The ordinance of the city of Houston, the validity of which my brethren uphold, is void because it authorizes such an arrest.

For that reason, I do not agree to the affirmance of this case.

On Motion for Rehearing

MORRISON, Presiding Judge.

In our original opinion we neglected to cite two recent opinions of the Supreme Court of the United States on the question of the legality of the instant search. Since we feel that they are in point with the instant case, we now do so: Salsburg v. State of Maryland, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281, and Irvine v. People of State of California, 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 561.

Remaining convinced that we properly disposed of this case originally, appellant's motion for rehearing is overruled.

OTIS WAYNE HARPER, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

No. 27736

COURT OF CRIMINAL APPEALS OF TEXAS

Nov. 9, 1955

MORRISON, Presiding Judge

The offense is the possession of heroin; the punishment, 10 years.

Officer Tucker testified that at approximately 5:00 P. M. on the day in question he observed two men, one of whom he recognized as Haynes, seated in a parked automobile on a street in the City of Houston some 50 feet from a filling station; that the automobile had two flat tires, and 'the right side was bent'; that Haynes was 'sitting with his head kind of slumped over the wheel,' and he could barely see the top of the head of the other man; and that it looked to him like they had been involved in an accident. Tucker circled the block, and when he returned Haynes had gone inside a filling station and the appellant was standing up on the sidewalk. He went up to the appellant, whom he knew had been to the penitentiary for narcotics and had been arrested several times on suspicion of narcotics, and he thought once for burglary; and we then quote from his testimony: 'I told him we have been having some bad reports on him; that we had heard that he had been pushing heroin

out in the Denver-Harbor Addition.' Tucker stated that he then arrested the appellant and searched his person and found the heroin which forms the basis of this prosecution.

By bill of exception No. 1 it is shown that the appellant is 5' 2" in height, weighs about 96 pounds, is a badly deformed hunchback, and when sitting is about one head lower than an average sized adult person; and, according to the officer's testimony, he got the impression that the other man with Haynes was slumped down when he first passed but that he could have been mistaken because he found that the appellant was so short.

The officer's testimony is confusing on this point, but we think a reasonable construction of the record would be that after the search the appellant was then asked where he had been, to which question the appellant failed to give a definite answer, and he was also asked where he had bought the heroin, which question no answer is shown.

Following this, Haynes came out of the filling station, and he was arrested. We think a discussion of the officer's observation of Haynes' condition at the time of his arrest would be of no probative value in this case because the appellant was already under arrest when Haynes came upon the scene.

The appellant did not testify and offered no evidence in his own behalf.

The sole question presented for review is the admissibility of the fruits of the search of the appellant's person which followed his arrest.

The State relies upon the ordinance of the City of Houston passed under the authority of Article 214, V.A.C.C.P.; Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, and

Id., 144 Tex. Cr. R. 88, 160 S.W. 2d 957; McCutcheon v. State, 158 Tex. Cr. 419, 252 S.W. 2d 175; the recent opinion of this Court in French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, and several other cases.

The appellant contends that the ordinance of the City of Houston goes much further than is authorized by Article 214, V.A.C.C.P., and is therefore not authorized by the statute.

In the two Holt cases, the facts surrounding the arrest and search of the Holts are not set forth, and therefore are of little aid to us here. We note, however, that the court held the fruits of the search admissible under both the ordinance and Article 325, V.A.C.C.P.

In the McCutcheon case, the officers saw two men step up on the sidewalk at night and throw something over a hedge. The officers then questioned the men, and they denied that they had thrown anything; the officers then looked behind the hedge and found two shirts. We held that such conduct on the part of men unknown to the officers authorized a search of their persons and their automobile under the ordinance of that city.

In the recent French case, the facts were these. Two narcotic enforcement officers were outside a certain cafe in the City of Houston, observing, while uniformed officers were making a raid inside the cafe. They observed the appellant, who was known to them to be a handler of marijuana, walk up to the door of the cafe where he could see what was going on inside, but instead of entering abruptly turned and ran to his automobile and endeavored to leave the vicinity in great haste. In that case, we were careful to say:

> "We do not hold that the information which the officer had received about the appellant's connection with narcotics alone would have authorized the search, but we do hold that his flight under the circumstances here presented, together with the information which the officer had about him, authorized the arrest of the appellant as a person of suspicious demeanor under the ordinance, and the subsequent search."

(1) But let us now carefully examine the facts in the case before us to determine whether or not the ordinance in question, insofar as it does not conflict with or exceed the power granted the city by Article 214, authorizes the arrest and search of the appellant here.

When the officer first passed, he says he got the impression that a parked automobile had been in an accident. But when he returned, he asked the appellant no questions about a collision, nor was any proof introduced to show that the automobile had been involved in a collision. In fact, this is what he said:

> "Got out of the car and went to the defendant and started talking to him. I identified myself, and his eyes started getting big, and he seemed to get very nervous; so I told the fellow he was under arrest for suspicion, and started searching him."

We see, therefore, that, stripped of all non-essential facts, we have here an officer who comes upon an ex-convict standing on the sidewalk during the business hours of the day doing nothing to indicate that he was involved in a violation of the law, and immediately arrests him upon "suspicion" and searches his person.

These were not, as we view it, sufficient grounds to authorize the arrest under the terms of the statute and

under the provisions of the ordinance which are not in conflict with the statute. Nor do we here find sufficient facts to authorize the arrest and search under Section 15 of Article 725b, V.A.P.C., as we did in Sutton v. State, 157 Tex. Cr. R. 216, 247 S.W. 2d 894.

(2) The facts in the French case differentiate it from the case at bar. Here, we have no flight from a place under the observation of the officers. The language we used in the French case was perhaps ill-advised. We there upheld the ordinance in its entirety, without discussion, on the authority of one of the Holt cases, because the writer then felt that the facts before us there would have justified an arrest under any ordinance drawn in accordance with the terms of Article 214, V.A.C.C.P.; and no necessity, therefore, existed to pass upon or determine the validity of other provisions of the ordinance. The writer remains convinced of the correctness of our holding in the French case, but he feels that such case is not authority here and that, if the Houston ordinance may be construed as to authorize the instant arrest, to that extent it is invalid, because it exceeds the powers granted the city by Article 214, supra.

We cannot bring ourselves to believe that it was the intent of the Legislature, in the light of the constitutional mandate against unreasonable searches and seizures, to give to a city the right to authorize a search with no more cause than is shown here.

The judgment of the trial court is reversed and the cause remanded.

WOODLEY, Judge (dissenting).

In the recent case of French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, in an opinion by Presiding

Judge Morrison, the ordinance here in question was upheld. Judge Davidson dissented and expressed the view that the ordinance was void.

The writer joined in affirming the conviction in French v. State, No. 27,637, Tex. Cr. App., 284 S.W. 2d 359, entertaining the view that Art. 214, C.C.P., authorized municipal authorities to establish rules authorizing the arrest without warrant of persons 'under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws', without regard to whether the place of the arrest is or is not a 'suspicious place'.

As I view it, the question here is whether there is sufficient evidence to show that the arrest was made under circumstances reasonably showing that appellant had been guilty of or was about to commit an offense against the law.

The facts and circumstances upon which the police officer acted include the following:

He knew appellant and his companion; knew them as "police characters"; had information that appellant "was a dealer in narcotics"; told appellant before the search "We had heard that he had been pushing (selling) heroin out in the Denver-Harbor addition" (the arrest occurred in that addition); was familiar with the police records of the two men and knew appellant had "been in the penitentiary before for narcotics".

Also he had information that appellant's companion "was wanted by the Burglary and Theft division, and also from the bulletin, for robbery."

Also, the officer knew that appellant had been arrested several times for "suspicion of narcotics", and perhaps once for burglary, and that his companion had been arrested several times for carrying a pistol and had been filed on several times for procuring.

With this information, the officer saw appellant and his companion Haynes, about 5 P. M., sitting in an automobile which was parked on the street some fifty feet from a service station. Two tires on the car were blown out and the right side was bent.

The two men were seated in the car as the officer drove by, Haynes "sitting with his head kind of slumped over the wheel", and appellant seated on the right side.

The officers proceeded to the next intersection, got out of their car and came back. When they got back, appellant was standing beside the car and his companion Haynes had gone into the nearby service station.

Asked what he said to appellant before the arrest, the police officer testified "I told him we had been having some bad reports on him; that we had heard that he had been pushing (selling) heroin out in the Denver-Harbor addition."

Officer Tucker also testified:

> "Q. When you returned back to where you had seen the defendant in company with Haynes parked, what did you do, Officer Tucker? A. Got out of the car and went to the defendant and started talking to him. I identified myself, and his eyes started getting big, and he seemed to get very nervous, so I told the fellow he was under arrest for suspicion, and started searching him.
>
> "Q. Did you search him? A. Yes sir, I searched him."

Upon these facts the officer searched appellant and found him to be in possession of a narcotic. He also searched the car and arrested and searched appellant's companion Haynes, who was under the influence of a narcotic and whose arm showed signs of a recent injection of a hypodermic needle.

If we were correct in Holt v. State, 144 Tex. Cr. R. 62, 160 S.W. 2d 944, (opinion by Judge Beauchamp); in Holt v. State, 144 Tex. Cr. R. 88, 160 S.W. 2d 957, (opinion by Judge Graves) and in the French case, in upholding the validity of the ordinance authorizing arrest on probable cause to believe that accused had been guilty of some felony or breach of the peace, or threatened or was about to commit some offense against the law, though the ordinance did not require nor the facts otherwise show anything about the place of the arrest being a suspicious place, then under such holding the judgment should be affirmed.

I am at a complete loss to understand how the ordinance may be valid as applied to French and invalid as to appellant, and respectfully dissent from such holding.

Judgment of the Court of Criminal Appeals

Trial Court No. 73,347

THE STATE OF TEXAS,

TO THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 5th day of October, A. D. 1955, this cause upon appeal to revise or reverse your Judgment between

BARNEY ELLIS FRENCH Appellant,

No. 27,637 vs.

The State of Texas, Appellee,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Appellant's Motion for Rehearing is overruled.

By order of the Court the mandate in this case was ordered stayed until the Court had further considered this case in connection with another case which was at that time pending before the Court. Both cases were finally determined on December 14, 1955, which date was also by order of the Court made the effective date of final decree in this case.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. W. A. MORRISON, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 16th day of December, A. D. 1955.

/s/ Glenn Haynes

Clerk.

Deputy Clerk

Constitutional Provision

Art. 1, Sec. 9, Texas Constitution:

"The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches: and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Statutes

Art. 214, C. C. P.:

"The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit some offense against the laws."

Art. 727, C. C. P.:

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in conection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding

of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Ordinance

Sec. 1649, of the ordinances of the City of Houston, Texas:

"Policemen shall have the right to arrest and interrogate all persons of suspicious demeanor, character or conduct, found on the squares, streets or bridges, or any public place or thoroughfare, or in, upon or about, or private buildings or premises, where they have no right or permission to be, and if such persons do not give a satisfactory account of themselves, and the police officer has good reason to believe that such persons intend, or are about to commit, or have committed any violation of the laws or ordinances of the city, is hereby made the duty of such officer to take such person into custody, or, if necessary for their safe keeping to put them in the City jail, and at the earliest time practicable to bring them with all the evidence and proofs applicable to their case before the Corporation Court for investigation and hearing."